

## Statutory holiday for workers on long term sick leave – Stringer decision

Readers may recall the case of *Stringer v HMRC*, which concerned the right to accrue statutory holiday during sick leave. We now report on the latest phase in this long running saga – the House of Lords decision reported on Wednesday. Unfortunately, a number of unanswered questions remain, so this will not be the last chapter in this story, by any means.

We also set out below our recommendations to employers on how to deal with this thorny issue in the meantime, based on the current position.

### Accruing holiday pay during sick leave

Earlier this year, the European Court of Justice considered this issue when the Stringer case was combined with a German case on the same point (*Schultz-Hoff v Deutsche Rentenversicherung Bund*). As reported in our alert in March this year, the ECJ decided that workers on long term sick leave should not be denied the right to annual leave, and must be allowed to take it on their return to work or be paid in lieu if their employment ends.

The case then went back to the House of Lords which yesterday overturned the Court of Appeal's decision that holiday did not accrue. All of which leads us back to the ruling of the Employment Appeals Tribunal: that workers do accrue statutory holiday during sick leave.

Importantly, however, by the time the Lords heard the case, the employer in question (HMRC) had already accepted that it was obliged to pay statutory holiday pay, bearing in mind the ECJ's decision. This meant that the only question the Lords had to answer was whether the claim could have been brought as a claim for unpaid wages under the Employment Rights Act or whether it could only be brought under the Working Time Regulations. As a result, the decision does not deal with many questions left over from the ECJ judgment.

### Deduction from wages

The relevance of the question which the Lords did address (wages -v- working time claim) is that different time limits apply depending on what type of claim the employee can bring.

A claim under the Working Time Regulations must be brought within three months of the date of breach (usually the end of the relevant holiday year). A claim for a

deduction from wages must be brought within three months of the deduction or, if there is a series of deductions, from the last deduction in the series. The Lords decided that the claim could be brought as a deduction from wages claim. What this means in practice is that a claim can be brought dating back to the first deduction (e.g. at the start of sick leave) until the last (e.g. when the employee leaves). This decision favours workers, at a potentially significant cost to employers.

## Impact on employers

Although the House of Lords did not comment on the main part of the ECJ decision (that statutory holiday accrues during sick leave), it did overturn the Court of Appeal's previous decision and so the position now is:

- **Current workers:** are entitled to accrue statutory holiday during long term sick leave. They can then take this when they return to work or be paid in lieu if their employment terminates.

But what if the sick leave straddles two holiday years? Although the ECJ ruled that, in this situation, the untaken leave would roll forward, that is inconsistent with the UK's Working Time Regulations which do not provide for carry over of accrued holiday year on year, and expressly forbid payment in lieu except for the year in which the employee leaves. These issues were not dealt with by the House of Lords and are unlikely to be resolved until we have another case on the point or the Government amends the Working Time Regulations in line with the ECJ decision.

- **Workers on permanent health insurance/disability benefit:** as they remain workers, they have the same rights as other workers – they accrue statutory holiday. Employers should check the terms of their scheme to see if the payments include holiday pay or whether the cover can be changed to include holiday pay, although that may be at an extra cost.
- **Ex-workers:** it may be too late for an ex-employee to make a claim now, if their final salary date was more than three months ago. Having read the press coverage of this case, they may try to bring a claim and the Tribunal would need to consider whether to allow them to. Traditionally, Tribunals have been reluctant to do this. If the employee left under a compromise agreement or COT3 settlement agreement, depending on the wording of the agreement, it may be possible to argue that this claim was settled or waived under that agreement.

## Recommendations for employers

- If, as a matter of policy, workers while on sick leave have been allowed to accrue statutory holiday, and to carry any unused holiday forward, then they would not have a claim and employers do not need to change their approach.
- The more common approach has tended to be that workers do not accrue, and are not paid for, untaken statutory holiday and are not allowed to carry it forward. For these employers, options are:
  1. **Do nothing:** wait until there is a case which answers the questions left open by the ECJ or the Government decides to clarify this through legislation. This has an obvious cost advantage in the short term. It does, however, carry the risk that current workers' rights will continue to accrue for those who remain on sick leave. In heavily unionised industries in particular, there is likely to be a flurry of communications from unions encouraging workers to bring a claim.
  2. **Revise your policy to allow for accrual but no payment in lieu or carry forward:** allow workers to accrue statutory holiday during sick leave but do not provide for it to be carried over into the next holiday year, or paid in lieu, if they have not been able to take it. Employers could also define parameters, such as what is meant by long term sick leave, or redraft their policy to provide that part of the sick leave will be treated as holiday (although it would then need to be paid as such). If employees leave part way through the holiday year, they would be paid in lieu for holiday for that year only, in accordance with the Working Time Regulations.
  3. **Option 2 plus payment in lieu for the current year only:** pay workers for accrued but untaken statutory holiday in the current leave year only, but not earlier years. This goes against the Working Time Regulations but it may help block wages claims for previous leave years on the basis there is no longer a 'series of deductions' going back over previous years.
  4. **Option 2 plus payment in lieu for current and previous years:** make a payment in full in respect of all previous years where statutory holiday was not taken due to illness. This is obviously the most expensive option and unlikely to be popular amongst employers unless and until the Working Time Regulations are amended to force employers to do so.

Our recommendation is that employers follow option 2 for now and wait for the Working Time Regulations to be amended, when we will also have a clearer idea of how far back any claim would go. This means that employees can accrue statutory holiday for the current holiday year and take it when they return (if they return in that year) but, if they do not, then they do not carry it forward and are not paid in lieu. If a sick employee says they wish to take holiday during their sick leave period, the employer could consider allowing them to do that, and paying them accordingly.

If an employee who might be affected by this decision leaves employment, employers should consider using compromise agreements which include waivers of any claim for backdated or unpaid holiday pay (making sure to cover off claims under both the Employment Rights Act and the Working Time Regulations).

Bear in mind that this decision only covers statutory holiday pay (28 days per year including bank holidays for a full time worker). Employers can draft their policies to make clear that accrual does not apply to additional contractual holiday.

Given the limited scope of the House of Lords decision, this is an unsatisfactory decision for employers. This alert deals highlights the key issues but, given the complexities involved, we recommend employers take advice on their options and how they wish to deal with this going forward.

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